Supreme Court, U.S.
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NO. 90-1456

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FREDRIC GERSON LEVIN,
Petitioner,

versus

THE FLORIDA BAR,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Alan H. Rosenbloum
417 Canterbury Lane
Gulf Breeze, FL 32561
(904) 932-5021, and
Ross M. Goodman
Levin, Middlebrooks, Mabie,
Thomas, Mayes & Mitchell, P.A.
P.O. Box 12308
Pensacola, FL 32581
(904) 435-7131

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Whether an attorney's First Amendment rights of free speech and Fourteenth Amendment rights of equal protection are abridged when, solely on the ground that the attorney stated an opinion against a misdemeanor statute, the attorney is selectively prosecuted and subjected to increased disciplinary penalties by the integrated bar and state supreme court for violation of that statute.

PARTIES

Petitioner	Fredric Gerson Levin, Esq. 226 S. Palafox Place Pensacola, FL 32501
Respondent	The Florida Bar James Fox Miller, Esq., President John F. Harkness, Jr., Esq., Executive Director 650 Apalachee Parkway Tallahassee, FL 32399-2300

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The Florida Bar v. Fredric Gerson Levin, ____ So. 2d ____ (Case No. 74,443, Florida Supreme Court, October 11, 1990); *pet. for rehearing, denied* (December 19, 1990).

BASIS FOR JURISDICTION

(a) Date of entry of judgment or decree sought to be reviewed: October 11, 1990.

(b) Date of denial of rehearing: December 19, 1990.

(c) The statutory provision believed to confer jurisdiction on the Court: 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TABLE OF AUTHORITIES

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NO. _____

IN THE

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October Term, 1991

FREDRIC GERSON LEVIN,
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ATTORNEYS FOR PETITIONER

STATEMENT OF THE CASE

Petitioner was among six attorneys in his metropolitan area who were reported to a State Bar Association Grievance Committee for placing bets on football games with a bookmaker. All six used the same "bookies," and employed the same methods of collecting their winnings and paying their debts. Pages 7-8, excerpt from Volume I, Transcript of Proceedings before Referee, *The Florida Bar v. Fredric Gerson Levin*, January 16, 1990, appended hereto at the Appendix, Tab "A." Of the six attorneys, some were not disciplined, some were disciplined with a private reprimand, but Petitioner was publicly prosecuted through formal disciplinary hearings. *Id.*

At the hearing before the Referee, Petitioner argued several times that the only reason why he had been singled out for public discipline was that he expressed his opinions on television that gambling is an acceptable form of recreational activity. Pages 230-232, 234, & 239, excerpts from Volume II, Transcript of Proceedings before Referee, *The Florida Bar v. Fredric Gerson Levin*, January 16, 1990, appended hereto at the Appendix, Tab "B."

After the hearing, the Referee recommended a public reprimand of Petitioner, which Petitioner appealed. *The Florida Bar v. Fredric Gerson Levin*, No. 74,443, page 1 (Fla. Sup. Ct. October 11, 1990), appended hereto at the Appendix, Tab "C." The only factual distinction found by the Referee between Petitioner and the other similarly charged attorneys was that Petitioner "advocated, on his own television show, betting with a bookmaker as an acceptable recreational activity." *Id.*, p. 2. Based upon this single factual distinction, Respondent asked for a more severe discipline of Petitioner than the other similarly situated attorneys.[1] *Id.*, p. 3. The Florida Supreme Court acceded to this request, holding as a matter of law that increased disciplinary penalities are merited against an attorney who not only commits a misdemeanor but also publicly advocates his opinions on the law which he has violated. *Id.*

Petitioner timely filed a Petition for Rehearing, arguing that the ruling imposing additional disciplinary sanctions violated Petitioner's constitutional rights of free speech. Respondent's Petition for Rehearing, *The Florida Bar v. Fredric Gerson*

[1] Respondent also sought additional discipline on the grounds that Petitioner supposedly admitted he would again gamble given the opportunity. However, as set forth in footnote 5 to its Opinion, the Florida Supreme Court recognized that Petitioner stated he would not gamble, in spite of his beliefs, if the Florida Supreme Court determined that such activity violated the attorneys' ethical code. Tab B, p. 3 & n.2.

Levin, No. 74,443, appended hereto at the Appendix, Tab "D." The Petition for Rehearing was denied on December 19, 1990 in a per curiam opinion. Order of December 19, 1990, *The Florida Bar v. Fredric Gerson Levin*, appended hereto at the Appendix, Tab "E."

This Petition followed.

ARGUMENT

Petitioner, described by the Chief Judge of his Circuit as probably the most outstanding trial lawyer in Florida, bet on football games in violation of a Florida misdemeanor statute. Pages 128-129, excerpt from Volume I, Transcript of Proceedings before Referee, *The Florida Bar v. Fredric Gerson Levin*, January 16, 1990, appended hereto at the Appendix, Tab "F." Five other attorneys did the exact same thing. Tab A. Of the six lawyers who all admitted their gambling, The Florida Bar dropped all charges against some, and gave private reprimands (a simple letter placed in the attorney's file) to all the others except Petitioner. The stated reason why Petitioner was selected to be charged publicly and given a greater penalty was that he expressed his opinion that he did not believe it was unethical for an attorney to gamble in the manner in which he gambled.

The offending remarks occurred as follows. Petitioner hosts a weekly cable television show. This is an on-air call-in talk show where listeners can speak with the host and the guests. In response to a caller's query, Petitioner truthfully admitted his gambling. His choices were to do so, or to lie. Petitioner stated his opinion that his actions were ethical. The Florida Bar disciplined Petitioner because of these remarks.

The question before this Court is whether there is the power in an integrated bar association to selectively enforce disciplinary rules solely because the attorney expresses an opinion. As shown below, the answer is no.

There is no question that states possess broad powers in regulating professions, especially the legal profession. *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 1899, 56 L.Ed.2d 417 (1978), and cases cited therein. However, equally clear is that such State powers do not allow abridgement of First Amendment freedoms. When Constitutional rights are involved, the test for the State action is one of "exacting scrutiny" where the State must "demonstrate 'a subordinating interest which is

compelling,'...and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of'" constitutional rights. *Id.*, 98 S.Ct. at 1905 (citations omitted); *see also, National Association for the Advancement of Colored People, etc. v. Button*, 371 U.S. 415, 438-39, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963).

It has long been a principle of constitutional analysis that free speech is given wide protection. "In the usual case involving a restraint on speech, a showing that the challenged rule served unconstitutionally to suppress speech would end our analysis..." *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810 (1977).

It must first be noted that *Bates* involved commercial speech, a form of speech which is given less protection under the First Amendment than Petitioner's non-commercial speech. 97 S.Ct. at 2698. Even so, the Court stated that commercial speech is "entitled to the protection of the First Amendment." *Id.*

Second, *Bates* establishes that penalizing free speech is constitutionally equivalent to prohibiting free speech. The Court explained further that "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute.... Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Id.*, at 2707; *see also, Button, supra*, 83 S.Ct., at 338.

Respondent cannot argue that Petitioner is being punished for flaunting the law, not for his exercise of free speech. The overbreadth doctrine dictates that the First Amendment must be applied to protect the free expression of ideas even if the particular expression under review is not necessarily protected. *Bates*, 97 S.Ct., at 2707, *see also, Button*, 83 S.Ct. at 338.

The instant petition presents a unique factual posture as all but one of the previous decisions on attorney discipline and First Amendment rights have dealt with attorney solicitation and commercial speech.[2] *See Peel v. Attorney Registration &*

[2] While the Supreme Court never reached the First Amendment questions in *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), that case provides strong support for Petitioner's contention that Bar discipline focused on speech is to be highly disfavored. In *Konigsberg*, petitioner had been refused admission to the California bar because he refused to answer questions regarding his political views or his alleged communist affiliation. After recognizing

Disciplinary Commission of Illinois, ____ U.S. ____, 110 S.Ct. 2281, 110 L.Ed.2d. 83 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Bates, supra; Button, supra; Primus, supra;* and, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

The one exception is *In Re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 1380, 3 L.Ed.2d 1473 (1959), where the Court stated "we start with the proposition that lawyers are free to criticize the state of the law." The attorney in *Sawyer*, while defending a Smith Act case, publicly stated her opinions on the Smith Act and the government's prosecution pursuant thereto. The Court stated that an attorney has the right to "speak as freely as another citizen." *Id.*, 79 S.Ct., at 1385. Finding the expressions to be protected speech, the Supreme Court reversed her discipline of one year's suspension. [3]

Upholding the discipline against Petitioner would be like selective prosecution of traffic offenders based solely upon their expression of opinion. If six automobiles were travelling down the interstate highway in violation of the speed limit and the Florida Highway Patrolman pulled over all six vehicles, he could legitimately arrest one and let the five others go. However, he could not arrest one and let the five others go because the one arrested had a bumper sticker reading "I disagree with the 55 mile per hour speed limit." This would be a denial of free speech.

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the State's strong interest in policing its bar associations, the Court stated "it is equally important that the State not exercise its power in an arbitrary nor discriminatory manner nor in such a way as to impinge on the freedom of political expression or association. . . . It is also important both to society and to the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." *Id.*, 77 S.Ct., at 733. The first *Konigsberg* decision resulted in remand, leaving open the question of whether the California Bar could deny petitioner admission solely on the grounds that he might subsequently refuse to answer questions. After he was later denied admission solely upon his refusal to answer questions regarding his membership in communist organizations, Konigsberg again was granted certiorari. In the second case, the Supreme Court affirmed the denial of admission. *Konigsberg v. State Bar of California*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). The significance of the second *Konigsberg* decision to the present petition is the Court's applying a balancing test to the competing interests of the State in having fit individuals as members of the bar, with the constitutional freedom of association which Konigsberg sought to protect. 81 S.Ct., at 1006, et seq. *See also In Re Anastaplo*, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961). Should the Petition for Certiorari be granted, the focus of the Briefs will be on explicating the competing interests and arguing the appropriate balance in this particular case.

[3] Other cases involving Supreme Court discussion of attorney discipline involve areas impinging on speech but not directly analogous to the present case, such as bar admission, *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Application of Stolar*, 401 U.S. 23, 91 S.Ct. 713, 27 L.Ed.2d 657 (1971); *Schware v. Board of Bar Examiners of the State of New*

CONCLUSION

Here the question involves neither solicitation nor commercial speech. The question is whether a pure expression of opinion by an attorney not associated with garnering employment is subject to additional discipline. As commercial speech deserves less protection than the speech involved here, and as Petitioner sought no pecuniary gain through his expression, the Supreme Court precedent related above dictates a holding in Petitioner's favor.

Respectfully submitted,

ALAN H. ROSENBLOUM
417 Canterbury Lane
Gulf Breeze, FL 32561
(904) 932-5021 and
ROSS M. GOODMAN
P.O. Box 12308
Pensacola, FL 32581
(904) 435-7131

Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), or the right against self-incrimination, *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), overruling, *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961).

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

CASE NO.: 74,413
TFB NO.: 87-27,937 (01A)

FREDRIC GERSON LEVIN,

Respondent.

VOLUME I

Transcript of proceedings in the above-styled case before the Honorable W. Fred Turner at the Judicial Building, Courtroom 501, Pensacola, Florida, on January 16, 1990, commencing at 9:00 A.M. Said proceedings were reported by Jo Ann Bryan, Court Reporter and Notary Public.

[Excerpts from pages 7 and 8.]

MR. ROSENBLOUM: Your Honor, we would at this point like to reserve the making of our opening statement until such time as The Bar completes the presentation of their case. As Mr. McGunegle said, we have reached a stipulation as to certain matters that will hopefully save the Court and ourselves some time in the case. I would like to read that stipulation into the record, and if Mr. McGunegle finds any fault with the facts as I'm going to state them, he can let us know.

The complainant and the respondent stipulate that at the time the ethics charges in this case were first made against Mr. Levin, that similar charges were made against at least six other lawyers in the First Judicial Circuit based upon essentially the same set of facts. That set of facts being that they made illegal bets on football games through the same bookies, and that collectors came to their law offices here in Pensacola to pick up bets and to collect money and to make deliveries. That in at least some of those six cases -- we don't know how many -- in at least some of those six cases, even though the attorneys admitted that they made illegal bets on football games, admitted that they made them through bookies, and admitted that the collectors came to their offices, that the committee found, the local Grievance Committee found, in some of those cases no probable cause to believe that any ethics violation had occurred.

In all the rest of the cases, other than the case involving Mr. Levin, the cases that no probable cause was found, the Grievance Committee allowed the other attorneys involved to make pleas of what's called minor misconduct, and those cases were never made public. That occurred as to every lawyer in this Judicial Circuit who was charged with illegal gambling on football games except one, that one being Mr. Levin.

Of all of the lawyers charged initially, the Florida Bar has seen fit to file in the Supreme Court of the state a formal complaint of ethics violations only against Fredric G. Levin.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

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TFB NO.: 87-27,937 (01A)

FREDRIC GERSON LEVIN,

Respondent.

VOLUME II

Transcript of proceedings in the above-styled case before the Honorable W. Fred Turner at the Judicial Building, Courtroom 501, Pensacola, Florida, on January 17, 1990, commencing at 9:00 A.M. Said proceedings were reported by Jo Ann Bryan, Court Reporter and Notary Public.

[Excerpts from pages 229 through 242.]

MR. ROSENBLOUM: Your Honor, Mr. McGunegle was kind enough to give me copies of this stack of cases he's given you. I don't have a stack of cases for you, Judge. What I've got is a just cause for it.

I think it's become apparent today that the issue in this case is what on earth are we doing here. Is the Florida Bar really serious about this? Does the Florida Bar intend to bring charges of unethical conduct against every lawyer in this state who bets on football games through a bookie or otherwise -- the statute doesn't make a distinction between that -- or who bets on a golf match, or does any of the other myriad of things -- playing poker -- any of the other myriad of things that constitute a second-degree misdemeanor under Florida law? Is that what the Florida Bar is here for? Or are we here because it's Fred Levin?

I think the answer to that is clear. And if Your Honor will remember from yesterday, The Bar has admitted so much.

Yesterday, before we started, Mr. McGunegle and I made a stipulation. I've had the liberty of asking the court reporter to type that stipulation, and I would like to read it to you.

"The complainant and the respondent stipulate that at the time the ethics charges in this case were first made against Mr. Levin, that similar charges were made against at least six other lawyers in the First Judicial Circuit based on essentially the same set of facts. That set of facts being that they made illegal bets on football games through the same bookies, and that collectors came to their law offices here in Pensacola to pick up bets and to collect money and to make deliveries. That in at least some of these six cases -- we don't know how many -- in at least some of those six cases, even though the attorneys admitted that they had made illegal bets on football games, admitted that they had made them through bookies, and admitted that the collectors came to their offices, that the committee found, the local Grievance Committee found in some of those cases no probable cause existed to believe that any ethics violations had occurred.

"In all the rest of the cases, other than the case involving Mr. Levin, the cases that no probable cause was found, the Grievance Committee allowed the other attorneys involved to make pleas of what's called minor misconduct, and those cases were never made public. That occurred as to every lawyer in this judicial circuit who was charged with illegal gambling on football games except one, that one being Mr. Levin.

"Of all the lawyers charged initially, the Florida Bar has seen fit to file in the Supreme Court of the state a formal complaint of ethics violations only against Fredric G. Levin."

Are we here because Fred Levin bet on football games and because that activity is a second-degree misdemeanor under a state statute that nobody cares about, that nobody enforces, that nobody even looks at except the Florida Bar? Or are we here for some other reason as some of the witnesses have suggested?

Your Honor, I really don't know the answer to that question. I really don't know the answer to that. Is Fred Levin immoral? Is he unjust? Is he dishonest? Is he unfit? I do know the answer to that question, and everybody that knows him knows the answer to that question, and everybody that's been in this courtroom for the last two days knows the answer to that question. He is not.

Does Fred Levin deserve to have a finding made that he is unethical? I know the answer to that question, too. And so does everyone else who has heard the testimony in this case over the last two days. He does not deserve that.

Is there any rule that requires Your Honor to make a finding that Fred Levin has been unethical? I submit that there is no such rule.

Fred Levin is guilty of some things, and I'm going to tell you he's guilty of some things. He's guilty of telling the truth; he's guilty of expressing his opinion; and he's guilty of being controversial. He's guilty of all of those things, and that's why he's here today.

Judge Fuchsberg who sat on the New York Court of Appeal for almost ten years said in his affidavit that when he sat on discipline cases that he and the members of his court always remembered -- and I might point out that this is the court of Benjamin Cardozo and Louis Brandeis. That they always remembered that while they did not trivialize matters of discipline that came before them, they always remembered that a lawyer in his nonprofessional life should not be judged by a higher standard than the judges held themselves out to.

Lawyers, Your Honor, are human beings. We are not angels, nor should we be angels. We are not perfect. And because we are not perfect and because we are not angels does not mean that everything that we do, whether a technical violation of some law or not, is justification for an ethics violation.

Let's look briefly at the evidence that's before Your Honor. Regardless of all of these little side issues that have been floating around, the case for The Bar is essentially this. This is the gist of it. Fred Levin bet on football games. He bet on those football games through a bookie. The statute that makes betting on football games a second-degree misdemeanor does not mention the word "bookie." It makes no difference at all when we're talking about the commission of this second-degree misdemeanor whether or not Fred Levin bet with a bookie, whether or not he bet with me, or you, or anyone else in this room, whether or not he played poker for $50 a hand, whether or not he bet on a golf match. It's the same exact second-degree misdemeanor.

So Your Honor should not be taken in by this magic word "bookie." The biggest bookie in this state -- and it came from that stand -- is this state. It runs the biggest numbers game in the world, and it runs it every day, and it has for the last few years.

Fred Levin admitted he bet on football games. He expressed his opinion on television. Expressing your opinion on television he has a right to do. And this is essentially what the State's case is.

Now, let's look at the other side. Let's look at the other evidence that you've heard from that stand.

Fred Levin is probably the most charitable man in Northwest Florida, the largest single contributor to several charities, including the United Way and United Cerebral Palsy, a patron of the arts said Mr. Boles, a champion of good government.

You heard by affidavit from the chairman of the democratic party who told you how Fred Levin was instrumental in getting Dempsey Barron, Senator Dempsey Barron, opposed because of something Dempsey Barron did. And what was that? Senator Barron, if you'll recall, stood on the floor of the Florida Senate and said that lawyers were the biggest bunch of bloodsuckers on earth and that he was ashamed he was a member of the Florida Bar. And what did the Florida Bar do about that? Not a thing. But Fred Levin went on television in Pensacola and said that he didn't think there was anything wrong with recreational gambling, and lo and behold, everything breaks loose and here we are, culminating what we're doing today.

Let's look at business. In the business world Fred Levin has been the chairman of the board of three large companies. He's listed in Who's Who; he's listed in Who's Who in Finance and Industry; he's listed in Who's Who in the World. And, Your Honor, this is just one man.

What about the practice of law? He's written a book that Your Honor heard is nationwide. He's lectured to other lawyers on legal matters throughout this country for years.

Fitness, let's talk about fitness for a minute. Let's talk about a just man. What did Judge Blanchard say? Judge Blanchard, one of the most respected judges ever to sit in this circuit. The finest lawyer in this circuit he said. The finest lawyer in the state. One of the best in the nation. Would Judge Blanchard have said those things about a lawyer who's unethical, who's immoral, or unfit, or dishonest? I think not. And if we can look at the dates on the last certificate that was filed by Judge Blanchard and look at the dates on the two tapes that the Florida Bar is relying heavily on, we will see that the last statement where Judge Blanchard said that Fred Levin is one of the best lawyers in the nation was made the day after he got on BLAB-TV and said he gambled.

Fred Levin's clients idolized him. Never in his 30-year career -- almost 30-year career as a lawyer -- has any client made a complaint against him. In fact, in that 30 years no client has ever been dissatisfied with his representation. Never has a client questioned his honesty, or morality, or fitness, or justness. Never in 30 years of practice has any judge questioned his honesty, or morality, or fitness, or integrity. Only the Florida Bar has done it, and it has done it in the complaint it has filed in this case. And I submit to Your Honor that that is unconscionable and shocking.

Mr. Lane came here from Atlanta to tell you about Mr. Levin, to tell you about his compassion and the way he works on his cases and his dedication to his clients.

Jack Drew -- and Fred Levin lost his case. And Willie Junior told you about the compassion this man has.

Sylvia Donahoo, his secretary for 11 years, told you about his willingness to see and talk and give advice to anyone who called on him for it, whether or not there was a fee involved or not. And you could see in her eyes when she sat on that stand -- you could see in her eyes the admiration she herself had for Fred Levin.

And among all these things there's more. He developed the structured settlement industry, and that's an important factor in the practice of law today. And in developing that, he put himself and his reputation on the line.

You've heard from a principal advisor to President Ford, a former chairman of the economics department at the University of Florida who called Fred Levin the father of economic testimony.

The periodic payment judgment statute. In almost every personal injury case economic testimony will be required. And this is where it started.

He speaks out against injustice. He did it at the University of Florida Law School and he did it before the members of the local bar society. This is the same man that the Florida Bar said you should find to be unethical, and that you should recommend that he be disciplined. I think not, Your Honor.

Let The Bar do what it's supposed to do. Let The Bar go after those few members of our profession who are unethical, who neglect their clients' work, who steal from their clients, who overcharge them. That's what The Bar is supposed to do.

Mr. McGunegle said it, and he said it like he was quoting from one of his stacks of papers, "The purpose of the Florida Bar is to protect the public from unscrupulous lawyers." Your Honor, the public does not have to be protected from Fred Levin. But if we take all of this evidence as to what this man has done, his ability, his compassion, his charity, and his integrity -- The Bar says throw all of that out; it's not relevant. Your Honor, I can't think of anything that's more relevant than the testimony you heard in two days. The Bar said we don't care about that, we don't care about any of that.

Fred Levin bet on a football game or football games, so let's show him. Let's embarrass him. Let's bring ethics charges against him. Again, I submit to Your Honor that that is shocking and outrageous.

Fred Levin got on TV and told the truth. He expressed his opinion, and he has the right to do that.

When we as lawyers are admitted to The Bar, we do not give up our First Amendment right. I know of no law or no rule that says a lawyer in this state can only make statements and have opinions that the Florida Bar thinks are proper.

Judge Middlebrooks mentioned in his testimony something about Chief Justice Rehnquist, that he plays poker. In the Sunday, January 7, 1990 issue of the Pensacola News Journal, there is, in fact, a big article on Chief Justice Rehnquist, who apparently celebrated his eighteenth anniversary on the court. That article says in part, "Rehnquist's plans may be uncertain. He has hinted privately that after several more years he might retire to spend more time with his four grandchildren and his hobbies, which include playing tennis and poker."

I submit first, Your Honor, that Chief Justice Rehnquist does not play poker for matchsticks. I also submit that if Chief Justice Rehnquist were a member of the Florida Bar, he may be the first sitting member of the Supreme Court in history to be charged with ethics violations by the Florida Bar because what he has done is a second-degree misdemeanor under the same statute that The Bar accuses Mr. Levin of doing.

All of these things, betting on football games, playing poker, betting on golf games -- these are not acts of moral turpitude, and I don't think The Bar is really saying that they are. These are matters that are second-degree misdemeanors under a statute that Your Honor heard from the witness stand over the last few days, a statute that's not enforced.

Betting on football games, whether we and The Bar like it or not, is an accepted part of American life. It's part of our culture. Millions of people, including lawyers, do it. And while that is not right -- it may not be right. And while that doesn't make it right, it also doesn't mean that if you do it and you are a lawyer, that you were unethical, unfit, dishonest, immoral, and unjust, and need to be disciplined. It is inconceivable to me, Your Honor, that a lawyer in this state can bet on dogs, he can bet on horses, he can bet on the lottery, he can bet on jai alai, he can bet on many things. And if he does that, he is fit, he is moral, he is just and honest and ethical.

But if that same lawyer bets on a football game, he's dishonest, immoral, unfit, and unethical. And yet this is exactly what the Florida Bar is asking you to say. That's what they want you to say.

Your Honor, Fred Levin epitomizes what a lawyer should be. But of all the things that you've heard about, the one thing that's the strongest is the thing that he's been accused of by the Florida Bar, integrity, honesty, and morality. I will tell you about integrity and morality. Fred Levin gave up the most lucrative financially prestigious account in Northwest Florida, and he did that because his client was smearing a man who couldn't fight back because he was dead. I submit to Your Honor that that is morality, and that is justice, and that is a man who is not unethical. Perhaps Mr. McGunegle can stand up -- he's got another shot at him. Perhaps he can stand up after I'm through and give us the name of any lawyer in this state or any other state who would do what Fred Levin did on a matter of principle.

Your Honor, Fred Levin did not embarrass the Florida Bar. The Florida Bar has embarrassed itself. We are here because Fred Levin is controversial and because

he shoots his mouth off. And there are people who are jealous of it. We are not here because the Florida Bar wants to prosecute lawyers who bet on football games.

In my opening statement I told Your Honor that I thought the Florida Bar should be giving Fred Levin a medal and not accusing him of being unethical. Now that all of the evidence is in, I stand by that statement with further additional -- that they should also give him an apology.

Thank you, sir.

SUPREME COURT OF FLORIDA

No. 74,443

THE FLORIDA BAR, Complainant,

vs.

FREDRIC GERSON LEVIN, Respondent.

[October 11, 1990]

PER CURIAM.

Respondent seeks review of the referee's order recommending that he be publicly reprimanded. We have jurisdiction. Art. V, § 15, Fla. Const.

Respondent was charged with violating the former Florida Bar Integration Rule, Article XI, rules 11.02(3)(a) (engaging in conduct contrary to honesty, justice, or good morals) and 11.02(3)(b) (engaging in conduct constituting a misdemeanor), and the former Florida Bar Code of Professional Responsibility, Disciplinary Rules 1-102(A)(1) (violating a disciplinary rule) and 1-102(A)(6) (engaging in conduct adversely reflecting on fitness to practice law). [1] The referee found that respondent routinely engaged in illegal gambling activities (bets of $500 to $2,000) over a period of at least five years; placed bets for others through his bookmaker; permitted bets and payoffs to be delivered to his law office; advocated, on his own television show, betting with a bookmaker as an acceptable recreational activity,

[1] Respondent's conduct occurred prior to January 1, 1987, the effective date of the current Rules Regulating The Florida Bar. Therefore, he was charged under the former rules. *See* The Fla. Bar re Rules Regulating The Fla. Bar, 494 So.2d 977 (Fla. 1986), *modified on other grounds*, 507 So.2d 1366 (Fla. 1986).

despite knowing that betting is a misdemeanor; and testified before a grievance committee that, if he had the opportunity, he would continue to bet. The referee recommended that respondent be found guilty and be publicly reprimanded by personal appearance before the Florida Bar Board of Governors.

Respondent does not dispute the facts underlying the referee's recommendation, but nevertheless urges that he is subject to discipline only if he violates a statute involving violence, dishonesty, breach of trust, or serious interference with the administration of justice. He argues that gambling is an accepted form of recreation in Florida, therefore, gambling, even through a bookmaker, is not a serious violation of the criminal law. He says the only difference between his case and the case of other lawyers who bet through bookmakers but received private reprimands was that he admitted on television that he had done so. He asserts that the referee's recommendation sets a bad precedent because lawyers who admitted, on television, to betting would be subject to discipline and, "How many Florida attorneys can say that they have never placed a bet on [a football game]?"

The Florida Bar argues that respondent's public statements, and his admission that he again would gamble given the opportunity, [2] require the imposition of more severe discipline than a private reprimand. We agree. An officer of the court must live within, and not flaunt, the law. "Attorneys are officers of the court and as such are expected by the bar, bench, and public to conduct themselves in accordance with the law." *The Florida Bar v. Weintraub*, 528 So.2d 367, 369 (Fla. 1988). [3] In *The Florida Bar v. Thompson*, 500 So.2d 1335, 1336 (Fla. 1986), we noted that attitude is a proper consideration in the imposition of discipline,

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[2] On or about March 5, 1987, and again on August 19, 1987, respondent appeared on his own television show on a local television station in Pensacola, Florida. During both shows, respondent stated that he engaged in illegal gambling activities by placing football bets with a bookmaker. During the August 19 show, he asserted his belief on camera that placing bets on football games with a bookmaker was an acceptable recreational activity. He further admitted he knew he was committing a misdemeanor offense by placing such bets. When asked during a hearing whether, given the opportunity, he would engage in illegal betting he responded, "To bet on football games, to be perfectly honest with you, yes. I don't think -- contrary to what others might feel, I don't think that it is a violation of ethics." When asked about his future intentions with respect to illegal gambling, he responded: "If His Honor and the Florida Supreme Court determine that this is an ethical violation, they don't have to worry about me ever doing it again."

[3] The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988), as here, respondent argued that his acts (possession and delivery of a controlled substance) did not reflect upon his fitness to practice law. We approved a ninety day suspension from practice, rather than disbarment, because there was no evidence that respondent's involvement was for profit.

because, "the tone of respondent's argument reflects a lack of understanding of the seriousness of the charges against him."[4] That observation is equally apposite here. We think Justice Ehrlich's comments in *The Florida Bar v. [Mark S.] Levine*, 498 So.2d 941 (Fla. 1986), are apt:

> There can be no trafficking in drugs unless there is usage and when a member of the bar uses them, he or she, albeit unwittingly, supports the trade and this cannot be countenanced. Lawyers are officers of the Court and members of the third branch of government. That unique and enviable position carries with it commensurate responsibilities. If the public cannot look to lawyers to support the law and not break it, then, pray tell, to whom may they look. It is this proper perception that makes this seemingly innocuous (in the superficial sense that the only one adversely affected is the one who indulges in the use of the drug) breach of the law, so very pernicious, in the eyes of the public and understandably gives rise to a full measure of cynicism. The bar needs the support of the public but it must merit that support, and when this Court gently slaps the wrist of a member of the bar who uses cocaine in contravention of the statute, the public may arguably have reason to believe that we are treating the bar as a privileged class above law and other citizens.

Id. at 942 (Ehrlich, J., dissenting) (urging suspension, rather than mere public reprimand with an appearance before the Board of Governors). Respondent argues that mere misdemeanor-betting violations should warrant different discipline than misdemeanor-drug violations. If this were a criminal prosecution, the respondent's point might be well taken, but for the purpose of bar discipline, the distinction is irrelevant. The lawyer has knowingly engaged in conduct constituting a misdemeanor. In this regard, the purpose of the discipline is the same.

Accordingly, we approve the findings and recommendations of the referee. Respondent is ordered to appear before the Florida Bar Board of Governors, at a time set by the Board, for the imposition of a public reprimand. Judgment for costs in the amount of $1,814 is entered against respondent, for which sum let execution issue.

It is so ordered.

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[4] In The Florida Bar v Thompson, 500 So.2d 1335 (Fla. 1986), we approved the imposition of a ninety-one day suspension for possession of a controlled substance, disorderly intoxication, and leaving the scene of an accident.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, GRIMES and KOGAN, J.J., concur.
BARKETT, J., dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director, John T. Berry, Staff Counsel, Susan V. Bloemendaal, Bar Counsel and Mimi Daigle, Assistant Bar Counsel, Tallahassee, Florida, and David G. McGunegle, Bar Counsel, Orlando, Florida,

for Complainant

Alan H. Rosenbloum, Gulf Breeze, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs. CASE NO: 74,443

FREDRIC G. LEVIN,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

In its Opinion issued on October 11, 1990, this Court stated two holdings, one of which was made without addressing Respondent's argument, and the other is such that clarification of the Court's Opinion is needed. First, the Court ruled that Respondent's expressions of his opinions on the laws against gambling require the imposition of sanctions. This ruling does not address, and violates, the free speech rights asserted by Respondent and guaranteed by the United States and Florida Constitutions. Second, the Court held that, no matter the violation, knowing commission of any misdemeanor subjects an attorney to discipline. Due to the apparent overbreadth of this ruling, Respondent seeks clarification and prays the Court consider the ramifications of this precedent.

Respondent does not challenge the underlying findings of the Court, nor the imposition of some form of sanctions. [1] While the public pillorying Respondent has received cannot be undone, it is not the fact of punishment which is questioned; rather, it is the manner in which the Court chose the punishment and the overbreadth of the Court's language which is questioned herein.

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[1] While Petitioner does not recede from the arguments raised in the prior briefs, no challenge is raised to the basic findings of fact and the implied finding that Petitioner's actions, as the actions of the others punished for the same offense, do not merit approbation. However, when the Court's

Respondent accepts punishment, as Respondent always maintained he would. [2] However, Respondenet cannot stand idly by as important constitutional rights are infringed.

First Amendment

The challenged portion of the Court's Opinion on First Amendment Grounds is set forth in full below:

> The Florida Bar argues that respondent's public statements . . . require the imposition of more severe discipline than a private reprimand. We agree. An officer of the court must live within, and not flaunt, the law. [3]

The Florida Bar v. Fredric Gerson Levin, Case No. 74,443 (Florida Supreme Court, October 11, 1990), p. 3. In essence, the Court is saying that, should an attorney committing a misdemeanor compound the wrong by publicly admitting the misdemeanor and expressing his or her personal beliefs about that law, the attorney is subject to increased penalty for expressing that opinion.

Clearly, the First Amendment to the United States Constitution and Art. 1, §4 of the Florida Constitution prohibit imposing or increasing a penalty solely based upon an exercise of free speech. In ruling upon the regulations passed by the State of Virginia against attorney solicitation as applied to the NAACP, the United States Supreme Court stated:

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ruling justifies increased punishment on the grounds of the exercise of free speech, such a position cannot go unchallenged.

[2] As found by the Court: "When asked about his future intentions with respect to illegal gambling, [Petitioner] responded 'If His Honor and the Florida Supreme Court determine that this is an ethical violation, they don't have to worry about me ever doing it again.'" *The Florida Bar v. Fredric Gerson Levin*, Case No. 74,443 (Florida Supreme Court, October 11, 1990), p. 3 n.2.

[3] Among the specific statements cited in the Court's opinion as grounds for increased discipline are:

> "During the August 19 show, he asserted his belief on camera that placing bets on a football game with a bookmaker was an acceptable recreational activity....When asked during a hearing whether, given the opportunity, he would engage in illegal betting he responded, 'To bet on football games, to be perfectly honest with you, yes. I don't think — contrary to what others might feel, I don't think it is a violation of ethics.'"

The Florida Bar v. Fredric Gerson Levin,*supra*, at p. 3 n.2.

> "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus, it is no answer to the constitutional claims asserted by the petitioner to say ... that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."

National Association for the Advancement of Colored People, etc. v. Button, 371 U.S. 415, 438-39, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963).

The fact that all the Court did was increase sanctions against Respondent, rather than hold that Respondent cannot speak his opinion on the gambling laws, does not insulate the challenged holding from First Amendment scrutiny. An outright ban on free speech is not a necessary prerequisite for First Amendment protection. The United States Supreme Court recognizes that imposition of a penalty against free speech is equally protected as an outright ban.*Id.*, 83 S.Ct., at 338 ("[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions"), *see also, Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810 (1977).

Neither can it be argued that Respondent is being punished for flaunting the law, not for his exercise of free speech. The overbreadth doctrine dictates that the First Amendment must be applied to protect the free expression of ideas even if the particular expression under review is not necessarily protected. *Bates*, 97 S.Ct., at 2707, *see also, Button*, 83 S.Ct. at 338.

The err of the Court's decision can best be highlighted by analogy to the civil rights struggle of the 1960's. If twenty people sit-in at a lunch counter and are arrested as part of civil disobedience, all should accept their punishment as prescribed under the law as part and parcel of their protest. Should two of the violators be attorneys, however, and one not only participates in the sit-in but also expresses an opinion that the laws are unjust, that attorney is subject to additional punishment in the form of harsher professional discipline than the attorney who does not speak out.

Thus, under the Court's ruling, before an attorney decides to exercise free speech on a legal issue, the attorney must consider the additional ramifications of increased professional discipline. As officers of the Court, do not attorneys have the responsibility to speak out against laws with which they disagree?

Respondent is not contending that his outspokenness on the issue of gambling on football games rises to the level of civil disobedience akin to the civil rights movement. However, it is the principle involved in the Court's ruling which must be addressed. If the punishment is allowed to stand on the basis of which it is justified in the Opinion, the case will stand as chilling precedent to all attorneys that their freedom of speech on political matters and the advisability of certain laws is delimited or at least subject to punishment should they cross the line from pure speech to speech coupled by action which, perhaps, violates a misdemeanor statute.

If the officers of the Court sworn to uphold the Constitutions of the United States and the State of Florida are themselves not given the same freedoms as granted in those grand instruments, then there is no merit to the ideals set forth in those writings.

Overbreadth of the Court's Language

Not only is the Court's Opinion infirm on constitutional grounds, but there is a deep pragmatic issue raised by the breadth of the Opinion. Respondent argued strongly in the briefs submitted that the Court must distinguish between misdemeanors demonstrating immoral conduct which are subject to sanction and other misdemeanors which, while violations of the law, are not prima facie grounds for discipline. Instead of recognizing this distinction and analyzing the particular statutes in question, the Court held "The lawyer has knowingly engaged in conduct constituting a misdemeanor. In this regard, the purpose of the discipline is the same." *The Florida Bar v. Fredric Gerson Levin, supra*, at pp. 4-5. [4]

In essence, the Court has ruled that commission of *any* misdemeanor is grounds for discipline. This, combined with the clear rule that any attorney who has knowledge of misconduct is subject to discipline if they do not report the violation, Fla. R. Regulat. Fla. Bar 4-8.3 (a), creates a clear conundrum for the practicing bar. The misdemeanor in question in this case concerns betting on a game of chance, making no distinction on who makes the bet, who takes the bet, or the amount of the bet. The misdemeanor in question requires that an attorney who makes a bet on a golf game (even a dollar), a tennis game, a bowling match or a steak dinner on the Florida/F.S.U. game, must be sanctioned as well as any attorney who has

[4] It is difficult to reconcile the Court's position in this case with the recent opinion issued in *The Florida Bar v. Edward T. Cook*, 15 FLW S541, 542 (Fla. Oct. 11, 1990), wherein the Court stated *per curiam* "that disciplinary proceedings are not appropriate in cases such as this which do not involve misrepresentation, dishonesty, deceit, or fraudulent procurement."

knowledge of, and fails to report, this conduct. There are a great many more misdemeanors that can be knowingly violated in Florida than simply the gambling statute. Any attorney presently abiding with another person of the opposite sex is subject to discipline, as well as all attorneys knowledgeable of this state of affairs who fail to report it. *Id.*, and Fla. Stat. §798.02. Does this Court mean to say that each and every lawyer in a large law firm in this state has an ethical obligation to report to the Bar that a young associate is in cohabitation with a person of the opposite sex?

In short, the Court's Opinion goes too far by categorically stating that the knowing violation of any misdemeanor statute, no matter the statute or the circumstances, is akin to drug use and therefore subject to discipline. The basis for such a holding is that violation of *any* law by an attorney subjects the entire profession to public censure. Are lawyers required to be saints?

Relief Sought

For the reasons set forth above, Respondent contends that it is unconstitutional to increase the punishment to him because he spoke out. Therefore, the public reprimand should be withdrawn, and the imposition of sanctions equivalent to the toughest sanctions imposed upon the other attorneys who participated in the stipulated exact same conduct as Respondent be imposed, i.e., private reprimand.

Secondly, Respondent seeks the Court either recede from its position that violation of *any* misdemeanor is subject to discipline by issuing a clarifying Opinion, or that the Court withdraw its Opinion in its entirety and simply issue an Order that Petitioner receive a private reprimand.

ALAN H. ROSENBLOUM
417 Canterbury Lane
Gulf Breeze, FL 32561
(904) 932-5021
Fla. Bar No. 068450
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Respondent's Motion and Brief in Support of Motion for Rehearing has been furnished, by regular U.S. Mail, to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; and copies of the foregoing Motion and Brief have been furnished, by regular U.S. Mail, to David G. McGunegle, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801, and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 24th day of October, 1990.

ALAN H. ROSENBLOUM
Attorney for Respondent

SUPREME COURT OF FLORIDA

Wednesday, December 19, 1990

THE FLORIDA BAR,

Complainant,

vs. CASE NO.: 74,443

FREDRIC GERSON LEVIN,

Respondent,

Respondent's Petition for Rehearing filed in the above cause is hereby denied.

SHAW, C.J., OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur

A True Copy

TEST:

TC

cc: David G. McGunegle, Esquire
Mimi Daigle, Esquire
John T. Berry, Esquire
Alan H. Rosenbloum, Esquire

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

CASE NO.: 74,413
TFB NO.: 87-27,937 (01A)

FREDRIC GERSON LEVIN,

Respondent.

V O L U M E I

Transcript of proceedings in the above-styled case before the Honorable W. Fred Turner at the Judicial Building, Courtroom 501, Pensacola, Florida, on January 16, 1990, commencing at 9:00 A.M. Said proceedings were reported by Jo Ann Bryan, Court Reporter and Notary Public.

[Excerpts from pages 128-129.]

MR. ROSENBLOUM: Your Honor, we would like to offer as Respondent's Exhibit No. 4 the Florida Bar Designation Plan Certification of Reference of Judge M. C. Blanchard of the Circuit Court of the First Judicial Circuit of Florida on behalf of Fredric G. Levin dated October 17, 1983. I would like to read a portion of that, Your Honor.

The question is asked on the form, "Briefly summarize your knowledge of the applicant's claim of substantial experience in the area of designation indicated above during at least the previous three years."

Judge Blanchard says in his own handwriting, "I have presided at several of Mr. Levin's trial (sic) during the past three years and many during the previous years. He is always well prepared and very successful in his cases. He has secured record-breaking verdicts in every type of damage suit. In my opinion he is the best we have in the First Judicial Circuit and probably in the State of Florida."

Signed M. C. Blanchard, 10/17/83.